WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES FEBRUARY 2010

Please note, cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Barron	Jackson	Milwaukee
Brown	Portage	Washington
Green Lake	Sauk	Waukesha

TUESDAY, FEBRUARY 9, 2010

9:45 a.m.	08AP1144	Borek Cranberry Marsh, Inc. v. Jackson County
10:45 a.m.	08AP787	Francis Groshek v. Michael G. Trewin
1:30 p.m.	08AP1521-CR	State v. Rashaad A. Imani

WEDNESDAY, FEBRUARY 10, 2010

9:45 a.m.	08AP919	James Zarder, et al. v. Acuity, A Mutual Insurance Co.
10:45 a.m.	08AP1324	Kevin Blum, Jr., et al. v. 1st Auto & Casualty Ins. Co.
1:30 p.m.	08AP652-CR	State v. Jim H. Ringer

THURSDAY, FEBRUARY 11, 2010

9:45 a.m.	08AP1546	Robert D. Konneker v. Robert S. Romano
10:45 a.m.	08AP2028	Barbara C. Grygiel v. Monches Fish & Game Club, Inc.
1:30 p.m.	09AP1021	Estate of James F. Sheppard v. Jessica Schleis, et al.

TUESDAY, FEBRUARY 23, 2010

9:45 a.m.	07AP1868	Johnson Controls, Inc. v. London Market
10:45 a.m.	08AP1735	Ash Park, LLC v. Alexander & Bishop, Ltd.

In addition to the cases listed above, the following case will be decided by the court based upon the submission of briefs without oral argument:

07AP2604-D Office of Lawyer Regulation v. Glenn J. Blise

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 9, 2010
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Jackson County Circuit Court decision, Judge John A. Damon, presiding.

2008AP1144 Borek Cranberry Marsh Inc. v. Jackson County

In this case, the Supreme Court is asked to examine Wis. Stat. § 706.10(3) (2007-08) and whether sand extraction rights contained in a 1978 deed applied only to the property owner at the time or also to heirs and assignees. The Supreme Court also is asked to decide if precedent dictates that deeds be interpreted in favor of public entities – in this case, Jackson County.

Some background: Jackson County owns property adjacent to a cranberry farm owned by Borek Cranberry Marsh Inc. in the Town of Knapp. Borek received ownership of its property from the original shareholders of the corporation, Julius and Darlene Borek, who received their interest from Carl and Ann Nemitz in a deed dated May 8, 1978. That deed also granted an easement to Carl Nemitz providing water flowage rights and the right to remove sand from the adjacent county land for $500.

Seeking to make use of the sand removal right in its cranberry farming operation, Borek brought an action for a declaratory judgment to enforce the easement. The parties filed cross motions for summary judgment.

The circuit court granted summary judgment to the county, concluding that the right of sand removal in the deed was personal to Nimitz, and therefore was not transferable to Borek. Borek appealed, and the Court of Appeals reversed.

Borek successfully argued before the Court of Appeals that the sand removal right was transferable because it does not evince an express or necessarily implied intent to create a personal right that would overcome the presumption of transferability of conveyances established in § 706.10(3).

The county argues that § 706.10(3) does not require every reference to a party in every deed be interpreted to include heirs or assigns of that party. The county says that the only plausible reading of the deed's language makes the water rights assignable but not the sand rights. The county submits the Court of Appeals' failure to give weight to Brody v. Long, 13 Wis. 2d 288, 108 N.W.2d 662 (1961) permits Borek to operate a business at the expense of a public resource.

Borek says Brody's principles should not be applied and the Court of Appeals properly found that because there was no express declaration that the sand removal right was personal to Nemitz, the right to remove sand was transferable.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 9, 2010
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Portage County Circuit Court decision, Judge Thomas T. Flugar, presiding.

2008AP787 Groshek v. Trewin

This case stems from a series of real estate transactions and loan agreements between a couple facing financial difficulties and an attorney who had represented them at times.

The Supreme Court is asked to examine two questions – one each raised by the opposing litigants: 1) whether punitive damages may be awarded to a plaintiff who sought and obtained equitable relief; and 2) whether an attorney owes a fiduciary duty to former clients when negotiating and entering into a transaction with them, when they are alleged to have been represented by independent counsel, have sought out the transaction, and initiated negotiations.

Some background: Some of the details in this case are disputed, but Francis and Karen Groshek had owned real estate, including a home, land and sawmill, which they operated before being foreclosed on by F&M Bank.

In March 2004, the Grosheks filed for bankruptcy, and Michael G. Trewin was their attorney of record. Trewin allegedly arranged a deal, ostensibly to help the Grosheks stay in their home, before his license to practice law was suspended on Aug. 31, 2004.

On Aug. 27, 2004, Trewin had written to the Grosheks, proposing that he buy their land "for enough money to pay off F&M Bank," sell roughly 40 acres to their neighbors, and give the Grosheks a lease on the remaining land for $1,300 per month with an option to purchase for $239,585, less the proceeds from the sale to the neighbors.

On Aug. 30, 2004 – the day before Trewin's license to practice law was suspended – the Grosheks executed a waiver of conflict of interest drafted by Trewin. At the same time, they executed an agreement with him that provided that he was to purchase from them the real estate on which F&M Bank held the mortgage "in return for a full release of any claim against [the Grosheks]." The agreement further provided that, after selling approximately 40 acres to the neighbors, he was to lease the property back to the Grosheks according to the terms of an attached lease. Neither the Grosheks nor Trewin signed the attached lease at that time. At some point thereafter, a different attorney began to represent the Gresheks.

On Nov. 26, 2004, the Grosheks executed and delivered to Trewin a deed to their home and 34 acres, having sold 40 acres to their neighbors for $108,000. Trewin paid the Grosheks $94,500. That same day, the Grosheks and Trewin signed a five-year lease, effective Dec. 1, 2004, with a monthly rent of $1,300 plus real estate taxes and insurance on the property. The lease contained an option to purchase for $127,500 between Jan. 1, 2006, and the end of the lease term, provided all monthly rental payments were promptly made.

Trewin canceled the lease in April 2006 for nonpayment of rent. The Grosheks remained living in the home for several months under an oral lease.

The Grosheks initiated an action, claiming that Trewin had breached his fiduciary duty to them in various ways by entering into the transaction with them regarding their property. Terwin answered and filed a counterclaim seeking eviction and unpaid rent.

After a bench trial, Trewin was found to have breached his fiduciary duty to the Grosheks, whom he had represented through bankruptcy proceedings. The circuit court voided the contract and awarded $38,200 in punitive damages against Trewin. It also dismissed Trewin's counterclaim against the Grosheks for eviction and unpaid rent.

On appeal, the Court of Appeals affirmed in all respects, except it reversed the award of punitive damages. Both parties have asked the Supreme Court to review the case.

Trewin argues that because the conveyance of the property and the lease execution did not occur until late December 2004, when the Grosheks were represented by another attorney, nothing transpired when he was representing them that could constitute a breach of his fiduciary duty.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 9, 2010
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Waukesha County Circuit Court decision, Judge J. Mac Davis presiding.

2008AP1521-CR State v. Imani

This criminal case examines whether a new trial is required in a case where a trial court denied the defendant's request to represent himself in the trial court without conducting a Klessig colloquy.

See State v. Klessig, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). Pursuant to Klessig, if a defendant seeks to exercise his right of self-representation, the trial court must ensure that the defendant knowingly, intelligently and voluntarily waives the right to counsel, and is competent to proceed *pro se*.

Some background: Rashaad A. Imani was convicted on one count of armed robbery, as party to a crime, and one count of possession of a firearm by a felon, both as repeat offenses.

Rashaad Imani, who was accused along with his cousin, Raziga Imani, of robbing a West Allis bank in 2006, pled not guilty, and a joint trial date was set for both defendants. Before trial, Rashaad moved to suppress in-court identification of him on grounds that television news coverage may have tainted it. When the court denied the motion, Rashaad advised the court he wanted to represent himself in court.

The court asked Rashaad why he thought he was competent to represent himself. Rashaad told the court he had been "working on" his case for 13 months, had a tenth-grade education, that he reads and writes English at college level, and was in court on at least five other matters with a lawyer. There was no discussion about the seriousness of the charges against Rashaad, the penalties that could be imposed, or the drawbacks or difficulties attendant to self-representation.

The circuit court judge denied the motion, explaining he wanted "to preserve the trial date, maintain the opportunity to be prepared and go forward." The court said that it was "willing to hear the motion again … but it is going to have to be in a context where I know the trial date is not going to be jeopardized."

Rashaad responded that he "ha[d] no problem" with the trial date. The court then said that if given notice, it would consider letting Rashaad participate in opening statement, closing argument and questioning the witnesses.

Rashaad did not renew his motion. The matter went to trial with appointed counsel, and the jury returned guilty verdicts on both counts.

Rashaad appealed, arguing that the trial court wrongly deprived him of his constitutional right to represent himself because he established a knowing, intelligent and voluntary waiver of his right to counsel, and that he was competent to proceed *pro se*.

The Court of Appeals rejected the claim that there was a valid waiver of counsel because the trial court failed to conduct a Klessig colloquy.

The state has asked the Supreme Court to review the Court of Appeals' decision ordering remand for a new trial, instead of a retrospective evidentiary hearing to determine whether the Klessig standard was met.

In making a decision, the Supreme Court is expected to balance concerns of judicial efficiency and judicial discretion with the constitutional right of self-representation.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 10, 2010
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Waukesha County Circuit Court decision, Judge Kathryn W. Foster, presiding.

2008AP919 Zarder v. Humana Insurance Co.

In this case, the Supreme Court is asked to clarify the meaning of "hit-and-run" in an uninsured motorist policy, and in an insurance statute, as applied to the facts of this case.

Some background: On Dec. 9, 2005, an unidentified vehicle struck 12-year-old Zachary Zarder while he was riding his bicycle. The vehicle stopped, and three males exited the vehicle. One male asked Zarder if he was okay. When Zarder replied that he was okay, the three males got back into their car and drove away.

Zarder also told other witnesses that he was just scared and wanted to stay where he was for a moment. The witnesses then left the area. It was not initially known, but Zarder did have some serious injuries, including two fractures that required two surgeries and resulted in medical bills above the coverage limits of Zarder's family's medical insurance.

Zarder and his parents filed a lawsuit against Acuity seeking uninsured motorist coverage under the family's automobile policy. Zarder claimed that the collision with the vehicle was covered under the Acuity policy because it was a "hit-and-run" accident with an unidentified motor vehicle.

Acuity moved the circuit court for a declaration that there was no coverage because the accident was not a "hit-and-run" because the driver had stopped and inquired as to whether Zarder was okay. The circuit court denied the motion.

The Acuity policy promised to pay damages for bodily injury sustained by an insured person that was caused by the ownership, maintenance or use of an uninsured motor vehicle. The policy defined an "uninsured motor vehicle" as, among other things, "[a] hit-and-run vehicle whose owner or operator is unknown" and which strikes an insured.

Although the circuit court's decision was not a final order or judgment, the Court of Appeals granted leave to file an appeal "because the issue is novel and because deciding it would further the administration of justice by definitively deciding the meaning of run in 'hit-and-run.'"

Acuity has asked the Supreme Court to review two issues:

1. Does the Acuity policy of insurance mandate uninsured motorist coverage for an alleged "hit-and-run" accident involving an unidentified motor vehicle and an insured where there is no "run," as that term is understood in the context of Wis. Stat. § 632.32(4)?

2. When an insurance policy covers "hit-and-run" as part of an uninsured motorist provision and the policy does not define the term, does "run" mean to flee without stopping?

A decision also could clarify the scope of the Court of Appeals' power to declare certain statements in a Supreme Court decision to be non-binding dicta and then to review an issue without regard to the Supreme Court's prior statements.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 10, 2010
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Sauk County Circuit Court decision, Judge Guy D. Reynolds presiding.

2008AP1324 Blum v. 1st Auto & Casualty

In this case, the Supreme Court has been asked to clarify law involving uninsured motorist policies when a vehicle involved in an accident is not insured but the driver is insured under another policy.

A decision could determine how precedent is applied when the Court of Appeals relies, at least in part, on a Court of Appeals' decision that was subsequently overruled by another Supreme Court decision.

In addition, the Supreme Court is expected to consider this case in light of changes made to the definition of uninsured motorist as enacted in 2009 Act 28, the 2009-11 state budget.

The factual background is not disputed. Kevin Blum jumped on the hood of the vehicle driven by Nicholas Burch in the high school parking lot. Burch accelerated and then applied the brakes, causing Blum to fall off and strike his head on the curb. Blum was seriously injured.

Burch's father owned the vehicle, which was uninsured. However, Burch had liability insurance under a policy issued by American Standard Insurance Company. In addition, Blum's parents had a policy with 1st Auto & Casualty Insurance Company.

Blum filed suit against Burch, his insurer (American Standard) and 1st Auto. Blum entered into an agreement releasing both Burch and American Standard in exchange for the policy's liability limits of $250,000. 1st Auto then moved for summary judgment contending that the uninsured motorist (UM) section of its policy did not afford coverage to Blum because, although the vehicle Burch drove was uninsured, Burch was insured. Blum counters that the plain language of the section provides coverage because the vehicle involved in the accident is an "uninsured vehicle" as defined in the policy.

The circuit court granted summary judgment to 1st Auto and denied Blum's claim for uninsured motorist benefits under that policy.

The Court of Appeals affirmed, stating that "[i]f the meaning of the policy language is plain, we apply that meaning. If there is an ambiguity, that is, if the policy language may reasonably be interpreted in more than one way, then we resolve the ambiguity by determining what a reasonable person in the position of the insured would understand the words to mean."

The Court of Appeals analysis relied heavily on its analysis in Hemerley v. American Family Mutual Insurance Co., 127 Wis. 2d 304, 379 N.W.2d 860 (Ct. App. 1985), which was overruled by Hull v. State Farm Mutual Automobile Insurance Co., 222 Wis. 2d 627, 586 N.W.2d 863 (1998).

The Court of Appeals explained this reliance on an overrule case, stating that "ordinarily holdings in our opinions not specifically reversed by the Supreme Court retain

precedential value." Sweeney v. Gen. Cas. Co., 220 Wis. 2d 183, 192-93, 582 N.W.2d 735 (Ct. App. 1998). The Court of Appeals thus asserts that the Hull decision only overruled its construction of Wis. Stat. § 632.32(4)(a), but left intact the analysis that the policy language at issue was ambiguous.

Ultimately the Court of Appeals in this case resolved the ambiguity in the policy language by holding that the policy does not provide uninsured motorist coverage because the allegedly negligent operator of the vehicle was covered by liability insurance.

Blum maintains in his petition for review that the meaning of the insuring clause and the definition of "uninsured motor vehicle" in 1st Auto's policy is plain and the court must apply it. He asks the Supreme Court to review the Court of Appeals' decision in light of the policy wording, statutory interpretation and precedent.

WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 10, 2010
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a Barron County Circuit Court decision, Judge Timothy M. Doyle, presiding.

2008AP652-CR State v. Ringer

In this interlocutory appeal, the Supreme Court examines the threshold necessary for a defendant in a sexual assault case to introduce evidence at trial of the alleged victim's allegation of sexual assault in a previous case. An interlocutory appeal is an appeal that occurs before the trial court's ruling on the entire case.

Some background: Jim H. Ringer is charged with sexually assaulting a 12-year-old girl. The state seeks review of a circuit court order that Ringer could introduce evidence at trial of the alleged victim's previous allegation against another man.

After testimony of the previous allegations, the trial court stated the defendant had met the burden of proving there was sufficient evidence to support a reasonable person's finding that the alleged victim had made prior untruthful allegations. The circuit court said that the biological father had made a statement to an investigator that "perhaps incriminates him," but there were competing inferences and no way to determine with certainty which may have been truthful.

The Court of Appeals ruled that the circuit court properly allowed the evidence pursuant to Wis. Stat. § 972.11(2)(b)3 as untruthful allegations of sexual assault.

The state contends that lower courts misapplied the ruling in State v. DeSantis, 155 Wis. 2d 774, 456 N.W.2d 600 (1990), with respect to the threshold necessary to show the previous allegations were untruthful, and the holding in State v. Rognrud, 156 Wis. 2d 783, 457 N.W.2d 573 (Ct. App. 1990), by ruling that a prior untruthful allegation of sexual assault may be proven by extrinsic evidence. The state also contends, contrary to the Court of Appeals' decision, that it has not waived its right to raise the issue regarding proof by extrinsic evidence.

The state says a prior allegation of sexual assault is not proven untruthful just because there was not enough evidence or it was never prosecuted. In addition, there is no precedent addressing whether the failure to prosecute renders a prior allegation untruthful, according to the state.

Ringer contends he cannot have a fair and full trial without admission of what he contends are prior false allegations and the ability to attack the credibility of the state's only witness.

A decision by the Supreme Court is expected to send the case back to the trial court for a ruling on the entire case.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 11, 2010
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Green Lake County Circuit Court decision, Judge William M. McMonigal, presiding.

2008AP1546 Konneker v. Romano

In this case, the Supreme Court is asked to review if the right to install a pier was granted by an easement that did not address pier construction, and where no pier had been installed in the easement during the two decades after the easement went into effect.

Some background: In 1983, all of the riparian and non-riparian property at issue in this case was owned by Barbara, Edward, Peter and Angeline Ciszek. At that time, the Ciszeks sold two lots, one of which is now owned by Robert and Ann Konneker. The deed for the property now owned by the Konnekers conveyed the property together with a 20-foot-wide easement along the side of a lot extending to Green Lake. At approximately the same time, the Ciszeks granted easements over the same strip of land to the owners of seven other neighboring lots.

In 1985, the Ciszeks sold the lake lot over which the easement ran (known as the "servient estate)." That lake lot is now owned by Norman and Lawrence Nelson and Robert and Francis Romano. In 1990, the Nelsons erected a pier on the servient estate, next to, but not on the easement.

At that time, the Konnekers' predecessors entered into a lease agreement with the Nelsons to use the Nelsons' pier. This lease was renewed on a yearly basis and required the payment of annual rent. Apparently, some of the other easement holders entered into similar annual leases with the Nelsons. No easement holder installed a pier on the easement.

When the Konnekers purchased their non-riparian lot in 2004, the Nelsons and Romanos refused to lease the use of their existing pier to the Konnekers or the other easement holders. In 2006, the Konnekers installed a pier on the shore at the end of their easement. The Nelsons and the Romanos subsequently removed the pier and refused to continue the leasing of the pier on their property to any easement holders.

The Konnekers sought a declaratory judgment that the easement authorized them to install a pier, and both sides filed cross-motions for summary judgment. The circuit court concluded that, although there was no direct evidence as to the intent of the original grantors, in view of the usual purpose of lake easements and in the absence of any indication that full access rights to the lake were limited in any way, the circuit court concluded that the easement authorized the Konnekers to install their pier.

The Court of Appeals reversed, stating that where the language of an easement is ambiguous as to its scope, courts are free to look at extrinsic evidence, including the parties' course of conduct over the years. The Court of Appeals indicated that it was improbable that the Ciszeks envisioned there being eight piers on a 20-foot-wide strip of shoreline.

In asking the Supreme Court to review the case, the Konnekers contend that the Court of Appeals failed to consider that the area in question had been primarily used as a

place to enter the lake by boat. The Konnekers also assert that a different district of the Court of Appeals recently decided a similar case and found that an easement granted riparian rights to a non-riparian owner, including the right to install a pier. See Partridge v. Georges, 2008AP1052.

The Romanos assert that the Court of Appeals simply applied well-established law regarding easements and decided the present case on the basis of the specific facts, which they say differ from cases cited by the Konnekers.

A decision by the Supreme Court could clarify and develop law related to easements and the right to install and maintain a pier.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 11, 2010
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Washington County Circuit Court decision, Judge David C. Resheske, presiding.

2008AP2028 Grygiel v. Monches Fish & Game Club

This case examines whether the use of an easement to access a parcel adjacent to the property for which the access easement was intended, constitutes a misuse of the easement.

Some background: The pertinent facts are not disputed. Monches Fish & Game Club benefits from a 40-foot-wide strip of land granted in 1973 "for the purpose of ingress and egress as a means of access" to the club's property.

In 1991, in previous litigation between Barbara C. Grygiel and the Club, the circuit court ruled the Club may not extend the use of the easement to any other parties.

Karl Scheife is a member of the Club and hunts on its land approximately 12 times a year. He also rents a home on land contiguous to the Club's property and his lease allows him to hunt on approximately 143 acres that borders Grygiel's land and is adjacent to the Club's land as well.

In November 2006, Scheife and seven other members of his hunting party were hunting on a parcel of land adjacent to the Club. They used the Club's easement over the Grygiel's land to reach the Club and from the Club's property they crossed over to hunt on land adjacent to the Club. It is undisputed that hunters with Scheife were not Club members and did not hunt on the Club property that morning. Rather, they parked at the Club and went over to the adjacent property to hunt. They also went to Scheife's home nearby and a member of the hunting party drove Scheife back to the easement, with the intention of using the easement to obtain Scheife's truck from the Club's property. As they approached, Grygiel had blocked their path across the easement and had called the sheriff's department.

Grygiel subsequently sued the Club and Scheife for violating the 1991 judgment, for trespass, and for breach of the easement. Grygiel sought summary judgment declaring that the 1991 judgment was binding; the Club did not have the right to grant use of the easement to third parties who sought access to property other than the Club's; and the Club members could not use the easement to access any property other than the Club's.

The circuit court dismissed Grygiel's claims, and the Court of Appeals affirmed. The Court of Appeals ruled that the use of an express easement, to pass over the property for which the easement is intended to gain access to farther adjacent property, does not impermissibly expand the scope or purpose of the easement.

In asking the Supreme Court to review the case, Grygiel raises three issues:

1. Should Wisconsin law allow holders of limited access easements to expand their access rights for the purpose of accessing other non-dominant, unrelated lands?
2. Does Millen v. Thomas, 201 Wis. 2d 675, 550 N.W.2d 134 (Ct. App. 1996), change Wisconsin law to allow holders of appurtenant easements to expand the use of those easements to access other unrelated lands, against the wishes of property owners, subject only to an after-the-fact contest over the degree of "burden?"
3. Should there be a "home base" exception to allow an easement's scope and purpose be expanded to new non-dominant land, so long as the easement holder touches the dominant "home base" before going to the non-dominant lands, and the easement holder does not actually own the new lands?

The Club argues that the circuit and Court of Appeals properly focused on the issue of "increased burden." It says that the Court of Appeals correctly relied on Millen and Wisconsin's easement law cited therein. Thus, the Club contends, it was entitled to conclude no increased burden resulted from the alleged trespass.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 11, 2010
1:30 p.m.

In this bypass of the District II Court of Appeals (headquartered in Waukesha), the Supreme Court reviews a decision by Washington County Circuit Court Judge Patrick J. Faraghar. A party may ask the Supreme Court to take jurisdiction of an appeal or other proceeding pending in the Court of Appeals by filing a petition to bypass pursuant to sec. (Rule) 809.60, Stats. A matter appropriate for bypass is usually one which meets one or more of the criteria for review, sec. (Rule) 809.62(1), Stats., and one the court feels it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues.

2009AP1021 Estate of James F. Sheppard v. Jessica Schleis, et al.

In this bypass of the Court of Appeals, the Supreme Court is asked to review who bears the tax liability for payable-on-death (POD) accounts.

Some background: Jessica Schleis, who was 17 years old, inherited $3.8 million held in POD accounts when her godfather, James F. Sheppard, died without a will on July 2, 2007. The total estate was approximately $12 million.

Schleis, acting through her parents, James and Mary Jo Schleis, entered an agreement with the estate to pay Jessica's proportionate share of both federal and Wisconsin estate taxes by leaving half of the funds on deposit. At the time the Schleises entered into the agreement, they were represented by Atty. Sharon Iggens, who approved the terms of the estate tax withholding agreement before it was signed by Jessica's parents.

In reliance on the agreement, Sheppard's estate provided the Schleis family with information it had about the POD accounts, delivered two death certificates to James Schleis and refrained from taking any action such as seeking injunctive relief, a constructive trust or otherwise, which might have impeded Jessica's ability to withdraw her half of the POD account balance.

Subsequently, contrary to the terms of the agreement and without notice to the estate, Jessica, with the aid of her parents, withdrew the entire $3.8 million from the POD accounts. Prior to the complete withdrawal of all funds, Mary Jo Schleis commenced a guardianship proceeding in Washington County.

On Oct. 10, 2007, Atty. Lisa Moore, the court appointed guardian ad litem for Jessica, indicated that once the parents were appointed guardians of Jessica's estate they could remove the funds in the POD accounts and that Jessica was in no way responsible for payment of any estate taxes.

On Oct. 30, 2007, James and Mary Jo Schleis were appointed guardians for their daughter. In the course of the guardianship process, the Schleis family retained another attorney, who indicated the previously signed agreement was not binding on her clients.

After reaching the age of majority on Feb. 18, 2008, Jessica Schleis did not repudiate the agreement. To date, the Wisconsin estate obligation has been paid in full, and the estate paid $444,597 to the IRS.

The Sheppard estate filed suit against the Schleis family seeking recovery of the taxes paid on the POD accounts. The defendants moved for summary judgment. On Feb.

24, 2009, the circuit court granted summary judgment and dismissed the plaintiff's suit. The circuit court agreed with the Schleises that the obligation to pay estate and inheritance taxes rests on the estate and the personal representative.

The estate argues that this case presents a need to implement policies within this court's authority with respect to the application of the doctrine of limited equitable apportionment to non-probate property, such as POD accounts. POD accounts are an increasing element of estate planning, yet there is very little case law governing them, according to the estate.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 23, 2010
9:45 a.m.

This is a certification from the Wisconsin Court of Appeals, District I (District IV judges presiding. District I is headquartered in Milwaukee. District IV is headquartered in Madison). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. The case originated in Milwaukee County Circuit Court, Judge Jean W. Di Motto and Patricia D. McMahon presiding.

2007AP1868 Johnson Controls v. London Market

This insurance dispute, which has spawned two previous appeals, asks the Supreme Court to examine an insurer's "duty to defend" under an excess umbrella liability policy in a business insurance context.

Some background: Johnson Controls has been involved in litigation with more than 20 insurers during the last 20 years over coverage for the potential costs associated with cleaning up environmental pollution at numerous sites covered by various policies.

Johnson Controls settled with a number of the insurers involved in the litigation, including with one insurer for less than the full policy amount. The company continues to seek coverage and a defense from underwriters of an excess umbrella liability policy, collectively known as London Market.

In July 2007, the circuit court ruled that London Market was obligated to defend Johnson Controls against environmental cleanup claims, and it denied a motion for summary judgment that would have relieved London Market of that obligation. London Market appealed, leading to this certification.

The Court of Appeals indicates the appeal now before the Supreme Court deals only with whether London Market has a duty to defend Johnson Controls under the terms of its excess umbrella liability policy.

The appeal raises two primary questions:

1) Should a duty to defend be imported from an underlying umbrella insurance policy into an excess umbrella liability policy by language in the excess policy? The "excess" policy states that it is subject to the same terms, definitions, exclusions and conditions as the underlying policy "except as otherwise provided?" The excess policy explicitly promises indemnification for certain liabilities but makes no mention of a duty to defend other than as noted above.

2) Is the excess liability carrier's duty to defend primary in nature, such that it may be triggered even if the excess policy expressly requires exhaustion of the underlying policy as a precondition to liability and the underlying policy has not been exhausted?

The Court of Appeals found little guidance in current law as to whether an excess insurer has a primary, rather than secondary, duty to defend, and under what circumstances a secondary duty to defend would be triggered.

London Market's primary argument is that this insuring agreement contemplated only indemnification to Johnson Controls. It points out that the insuring agreement nowhere mentions a duty to defend.

Johnson Controls contends the duty to defend is imported word for word from the underlying umbrella policy.

A decision by the Supreme Court could develop law in this area and affect both insurers and the individuals or businesses that purchase policies involving excess umbrella liability coverage.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 23, 2010
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Brown County Circuit Court decision, Judge William M. Atkinson, presiding.

2008AP1735 Ash Park, LLC v. Alexander & Bishop, Ltd.

This case involves a dispute over a $6.3 million sale of vacant commercial land in Brown County. The Supreme Court is asked to examine the implications of "specific performance" as a court-ordered remedy when the terms of a real estate sales contract aren't fulfilled by a buyer.

Some background: Alexander & Bishop, Ltd. (A&B) entered into a standard form contract (WB-13 Vacant Land Offer to Purchase) to purchase property from Ash Park, LLC to develop the land for retail purposes. The contract included a leasing contingency, which allowed A&B to terminate the deal if it failed to execute a lease with an anchor tenant by July 20, 2007.

If A&B utilized the leasing contingency, it was entitled to a refund of a $50,000 earnest payment that it had made to Ash Park. The sales contract also provided that the leasing contingency could be extended twice for two months each. In order to extend the leasing contingency, A&B was required to make a $25,000 nonrefundable payment to Ash Park.

A&B was not able to secure an anchor tenant, and on July 20, 2007, invoked the leasing contingency to terminate the deal. On Aug. 1, 2007, however, the parties executed a new agreement that reinstated the earlier sales contract, with some modifications. First, A&B agreed to pay a nonrefundable $25,000 extension fee, although the agreement did not specify whether this extended the leasing contingency to Sept. 20, 2007, as provided in the original contract, or to some other date. Second, the new agreement made the original $50,000 earnest payment nonrefundable. Third, the new agreement assigned to A&B an option to purchase some neighboring property.

A&B was still not able to land an anchor tenant. On Oct. 9, 2007, A&B verbally advised Ash Park that it was unable to land an anchor tenant and that it likely would not be able to do so until 2008. Ash Park indicated that it was willing to discuss potential modifications to the deal, but stated that if modifications could not be agreed upon, it would seek specific performance.

The parties were not able to reach a new agreement and A&B failed to close on the transaction on the Dec. 14, 2007, closing date specified in the original sales contract. Ash Park then filed an action for specific performance. The circuit court granted summary judgment to Ash Park. It ordered A&B to "perform pursuant to the terms of the contract" and to "take such actions as are necessary to complete the transaction." A&B nonetheless did not close the transaction. The circuit court subsequently ordered A&B to pay prejudgment and postjudgment interest to Ash Park at specified rates by certain dates.

On appeal, A&B argued, among other things, that specific performance was not an option, despite language in the sales contract expressly authorizing that remedy as an

option in the case of a buyer default. A&B contended Ash Park had an adequate remedy at law for damages. Alternatively, A&B asserted that where specific performance is ordered against a purchaser of real estate, the actual remedy should be a judicial sale of the property and a money judgment against the buyer for any deficiency. A&B also challenged the circuit court's order awarding prejudgment and postjudgment interest.

The Court of Appeals rejected all of A&B's arguments and affirmed the circuit court's orders. It cited to a number of cases that have stated that specific performance of a sale of real estate is an available remedy to both buyers and sellers. It concluded that the circuit court's specific performance order was proper because it did not contain a positive requirement to pay the amount due under the sales contract. It further found that A&B had waived its contention that the circuit court should not have ordered specific performance because A&B did not have the ability to pay the purchase price. It also determined that the circuit court's interest awards were proper.

A&B's petition lists one issue for review: "May a seller of real estate seek both specific performance, as well as interest on the purchase price without a requirement that it mitigate damages?"